

Practical Concerns Regarding the Arbitration of Statutory Employment Claims: Questions That Remain Unanswered After *Gilmer* and Some Suggested Answers

For every complex problem, there is a solution that is short, simple, and probably wrong -- H.L. Mencken¹

I. INTRODUCTION

The legality of arbitrating statutory claims arising out of employment has become quite controversial. In 1991, the United States Supreme Court delivered a decision which has the potential to evict employment claims from the judicial forum altogether. In *Gilmer v. Interstate/Johnson Lane Corp.*,² the Court held that the Federal Arbitration Act (FAA)³ compelled arbitration of a claim under the Age Discrimination in Employment Act (ADEA)⁴ where the claimant had signed an agreement in a securities registration application⁵ to arbitrate all employment disputes.⁶ This decision appears to permit, and perhaps even encourage, employers to establish arbitration systems as a means to resolve statutory obligations outside of the judicial forum. In so doing, the Court takes arbitration out of its traditional context of labor-management relations in the union setting.

Assuming that *Gilmer* provides a valid legal basis for the enforceability of an arbitration provision as a condition of employment, many practical issues and concerns remain unanswered regarding how arbitration should function in a non-union setting. Such unanswered questions are the focus of this Article. Section II discusses the *Gilmer* decision in detail, its impact, and the concerns that have arisen because of it. Section III describes our present system of arbitration in terms of how it functions, its traditional use in the labor-management context, and its advantages and disadvantages in

¹ See Arnold Zack, President of the National Academy of Arbitrators, Testimony at the final public hearing before the Commission on the Future of Worker-Management Relations (Sept. 29, 1994) (transcript available at the U.S. Department of Labor) [hereinafter Dunlop Commission]. This quote was used in the introductory portion of the testimony given by Mr. Zack.

² 500 U.S. 20 (1991).

³ 9 U.S.C. § 1-307 (Supp. 1992).

⁴ Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1988).

⁵ The application was entitled "Uniform Application for Securities Industry Registration or Transfer." 500 U.S. at 23.

⁶ *Id.* at 35. "Gilmer has not met his burden of showing that Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act." *Id.*

such a setting. Finally, Section IV raises and addresses the specific issues and concerns regarding the arbitration of statutory employment claims in the non-union setting, and attempts to offer some suggestions and conclusions as to how arbitration would be most effective in such an arena.

II. GILMER V. INTERSTATE/JOHNSON LANE CORPORATION⁷

A. *Synopsis of Decision*

Interstate/Johnson Lane Corporation (Interstate) hired Robert Gilmer in 1981 as a Manager of Financial Services.⁸ As required for his employment, Gilmer registered as a securities representative with the New York Stock Exchange (NYSE).⁹ Gilmer's registration application contained an arbitration clause pursuant to which he agreed to arbitrate any disputes between him and his employer arising out of his employment or the termination of his employment.¹⁰

Interstate terminated Gilmer's employment in 1987 when he was sixty-two years of age.¹¹ Believing that he had been discharged because of his age, Gilmer filed a charge of age discrimination with the Equal Employment Opportunity Commission (EEOC).¹² When Gilmer subsequently sued in federal court,¹³ Interstate filed a motion to compel arbitration under the Federal Arbitration Act.¹⁴ In doing so, Interstate relied upon the arbitration agreement contained in Gilmer's securities registration application with the NYSE, whereby Gilmer had agreed to "arbitrate any dispute, claim, or controversy" arising between him and Interstate that "is

⁷ *Gilmer*, 500 U.S. 20.

⁸ *Id.* at 23.

⁹ *Id.*

¹⁰ *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 196 (4th Cir. 1990). The arbitration clause in Gilmer's securities application provided: "I agree to arbitrate any dispute, claim, or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitutions, or by-laws, of the organizations with which I register" *Id.* at 196 n.1.

¹¹ *Gilmer*, 500 U.S. at 23.

¹² *Id.*

¹³ *Id.*

¹⁴ 9 U.S.C. § 4. "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement." *Id.*

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required to be arbitrated under the rules, constitutions, or by-laws, of the organizations with which [he] register[ed].”¹⁵ Among the disputes which the NYSE rules require to be arbitrated are those “arising out of the employment or termination of employment of such registered representative.”¹⁶ The NYSE rules made the duty to arbitrate mutual, obligating both the employer and the employee.¹⁷ Specifically, the employer was bound as a member of the NYSE, and the employee was bound by the registration application.¹⁸

The district court, relying upon the Supreme Court’s decision in *Alexander v. Gardner-Denver Co.*¹⁹ and its own conclusion that “Congress intended to protect ADEA claimants from the waiver of a judicial forum,”²⁰ denied Interstate’s motion to compel arbitration. The United States Court of Appeals for the Fourth Circuit reversed,²¹ basing its holding on *Shearson/American Express, Inc. v. McMahon*,²² in which the Supreme Court had held that the FAA establishes a presumption of enforceability of arbitration agreements, and on its own finding that “nothing in the text, legislative history, or underlying purposes of the ADEA indicat[es] a congressional intent to preclude enforcement of arbitration agreements.”²³ Subsequently, the United States Supreme Court granted certiorari to resolve the question of whether a claim under the Age Discrimination in Employment Act of 1967 can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application.²⁴

¹⁵ *Gilmer*, 500 U.S. at 23 (quoting in part *Gilmer*’s NYSE registration application).

¹⁶ *Id.* at 23.

¹⁷ As set out in the Uniform Application for Securities Industry Registration or Transfer, *supra* note 5, at 23.

¹⁸ Uniform Application for Securities Industry Regulation or Transfer, *supra* note 5, at 23.

¹⁹ 415 U.S. 36 (1974). See *infra* text accompanying note 47.

²⁰ *Gilmer*, 500 U.S. at 24.

²¹ *Id.*

²² 482 U.S. 220 (1987). The presumption can only be rebutted if Congress intended that the rights granted in a statute should not be resolved by arbitration. The intent of Congress can be manifested in one of three ways: textual prohibition of arbitration in the statute, legislative history indicating an intent to preclude arbitration, or an inherent conflict between arbitration and the statute’s underlying purpose. *Id.* at 226-27.

²³ *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 197 (4th Cir. 1990).

²⁴ *Gilmer*, 500 U.S. at 23. A major reason for granting certiorari was to resolve the split in circuits regarding this issue. Cf. *Nicholson v. CPC Int’l Inc.*, 877 F.2d 221 (3rd Cir. 1989).

Relying on *McMahon*,²⁵ the Court stated that the presumption that the arbitration agreement was enforceable could only be rebutted if Congress intended that the statutory rights established in the ADEA should not be resolved by arbitration.²⁶ Gilmer conceded that nothing in the text of the ADEA or in the ADEA's legislative history precludes arbitration,²⁷ but argued that compulsory arbitration of age discrimination claims would conflict with the underlying framework and purposes of the statutory scheme of the ADEA.²⁸

The Court, however, rejected this argument. Although it agreed with Gilmer's assertion that the ADEA is designed not only to address individual grievances but also to further important social policies,²⁹ the Court found no inconsistency between those social policies and enforcing agreements to arbitrate age discrimination claims.³⁰ The Court pointed out that the Sherman Act,³¹ the Securities Exchange Act of 1934,³² RICO,³³ and the Securities Act of 1933³⁴ are all designed to advance important social policies, and that all of those statutes have been deemed appropriate for arbitration.³⁵ The Court also rejected Gilmer's claim that compulsory arbitration would undermine the EEOC's active role in enforcing the ADEA.³⁶

²⁵ 482 U.S. 220.

²⁶ *Gilmer*, 500 U.S. at 26.

²⁷ *Id.*

²⁸ *Id.* at 27.

²⁹ *Id.*

³⁰ *Id.*

³¹ 15 U.S.C.S §§ 1-7 (1990).

³² 15 U.S.C.S § 78j(b) (1990).

³³ 18 U.S.C.S § 1961 et seq. (1990)

³⁴ 15 U.S.C.S § 771 (1990).

³⁵ *Gilmer*, 500 U.S. at 28.

³⁶ *Id.* at 28-29. The Court asserted that an ADEA claimant subject to compulsory arbitration may still file a charge with the EEOC, even though the claimant is not able to institute a private judicial action. Moreover, the Court stated that the EEOC's role in combatting age discrimination is not dependent on the filing of a charge, as the EEOC has the authority to make independent investigations. Finally, the Court pointed out that nothing in the ADEA indicated that Congress intended for the EEOC be involved in all employment disputes. Thus, the Court concluded, the mere involvement of an administrative agency in the enforcement of a statute is insufficient to preclude arbitration. Gilmer also argued that compulsory arbitration would be improper because it would deprive plaintiffs of the judicial forum provided for by the ADEA. The Court asserted that such a contention could not stand in light of the fact that Congress did not manifest an intent either in the text or in the legislative history of the ADEA to protect claimants against waiver of the right to a judicial forum. Moreover, the Court noted the ADEA's flexible approach to the resolution of age

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Gilmer's challenges to the adequacy of arbitration procedures in enforcing substantive rights were rejected by the Court as well.³⁷ The Court declined to indulge Gilmer's first speculation that the parties and the arbitral body would not retain competent, conscientious, and impartial arbitrators.³⁸ However, the Court did note that both the NYSE rules and the FAA protect against biased panels.³⁹ Gilmer next complained that the discovery allowed in arbitration is more limited than in the federal courts, which he contended would make proving discrimination more difficult.⁴⁰ The Court saw no merit in this argument, noting that it was unlikely that age discrimination claims would require more extensive discovery than the RICO and antitrust claims already deemed arbitrable under prior holdings.⁴¹ The Court asserted that there had been no showing that the NYSE discovery provisions, which allow for document production, information requests, and subpoenas, would prove insufficient to allow Gilmer a fair opportunity to prove his claim.⁴²

Moreover, Gilmer alleged that, because arbitrators often do not issue written opinions, any resolution in the arbitral forum would result in a lack of public knowledge of employers' discriminatory policies, an inability to obtain effective appellate review, and a stifling of the development of the law.⁴³ The Court rejected this contention by noting that the NYSE rules require that arbitration awards be in writing and be made available to the public.⁴⁴ Furthermore, the Court stated that because many ADEA claimants will not be subject to arbitration agreements, judicial decisions addressing ADEA claims would continue to be issued.⁴⁵

Gilmer argued that arbitration procedures could not adequately further the purposes of the ADEA because they do not provide for broad equitable relief and class actions.⁴⁶ The Court responded to this by noting that arbitrators do have the power to fashion equitable relief, and that the NYSE rules provide for collective proceedings and are not restrictive in the types of relief that an arbitrator may award. Moreover, the Court noted that

discrimination claims, through methods of out-of-court dispute resolution such as arbitration, is consistent with the statutory scheme established by Congress. *Gilmer*, 500 U.S. at 28.

³⁷ *Id.* at 30-32.

³⁸ *Id.* at 30.

³⁹ *Id.* at 30-31.

⁴⁰ *Id.* at 31.

⁴¹ *Gilmer*, 500 U.S. at 31.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 31-32.

⁴⁵ *Id.* at 32.

⁴⁶ *Gilmer*, 500 U.S. at 32.

arbitration agreements do not preclude the EEOC from bringing actions seeking class-wide and equitable relief.⁴⁷

The next reason Gilmer advanced for refusing to enforce arbitration agreements relating to ADEA claims was his contention that there is often unequal bargaining power between employers and employees.⁴⁸ The Court determined, however, that mere inequality of bargaining power was not a sufficient reason to hold that arbitration agreements are unenforceable in the employment context.⁴⁹ The Court believed that such a claim is best left for resolution in specific cases, and noted that in this particular case there was no indication that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application.⁵⁰

Gilmer's final argument resisted arbitration on the basis of the Court's decision in *Alexander v. Gardner-Denver Co.*⁵¹ and its progeny,⁵² in which

⁴⁷ *Gilmer*, 500 U.S. at 32.

⁴⁸ *Id.* at 32-33.

⁴⁹ *Id.* at 33.

⁵⁰ *Id.* at 33.

⁵¹ 415 U.S. 36 (1974). In *Gardner-Denver*, the issue was whether a discharged employee whose grievance had been arbitrated pursuant to an arbitration clause in a collective bargaining agreement was precluded from subsequently bringing a Title VII action based upon the conduct that was the subject of the grievance. In holding that the employee was not foreclosed from bringing the Title VII claim, the Supreme Court stressed that an employee's contractual rights under a collective bargaining agreement are distinct from the employee's statutory Title VII rights:

In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence.

Gilmer, 500 U.S. at 24 (quoting 415 U.S. at 49-50).

The Court also noted that a labor arbitrator has authority only to resolve questions of contractual rights. The arbitrator's "task is to effectuate the intent of the parties" and he or she does not have the "general authority to invoke public laws that conflict with the bargain between the parties." *Id.* at 34 (quoting *Alexander*, 415 U.S. at 53). By contrast, "in instituting an action under Title VII, the employee is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process." *Id.* (quoting *Alexander*, 415 U.S. at 54). The Court further expressed concern that in collective bargaining arbitration "the interests of the individual employee may be subordinated to the

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the Court held that the arbitration of an employment dispute under a collective bargaining agreement did not preclude subsequent resort to a judicial forum in order to enforce statutory employment rights. Gilmer argued that statutory discrimination claims could not be adequately resolved in arbitration because the rights invoked by such statutes deserve the publicity of a judicial forum.⁵³ Reliance on this line of cases was justified because the *Gardner-Denver* line of cases highlights the inferiority of arbitration to litigation in the protection of statutory rights and emphasizes the superiority of judges over arbitrators.⁵⁴

Interstate, on the other hand, insisted on arbitration on the basis of a line of FAA cases decided after *Gardner-Denver*. These cases held that the Federal Arbitration Act demands enforcement of private agreements to arbitrate statutory claims arising under antitrust,⁵⁵ securities,⁵⁶ and racketeering⁵⁷ laws. These cases are often referred to as the *Mitsubishi* trilogy, named after the first case to hold statutory claims arbitrable.⁵⁸

In the employment cases under the *Gardner-Denver* line, no mention was made of the Federal Arbitration Act. The FAA cases decided after *Gardner-Denver* did not involve statutory employment rights. The interplay between the FAA cases and the employment cases had to be addressed and resolved, because the *Mitsubishi* trilogy allowed the arbitration of statutory claims, while the *Gardner-Denver* trilogy did not.

The *Gilmer* Court ruled against Gilmer on this argument as well, stating that Gilmer's reliance on *Gardner-Denver* and its progeny was

collective interests of all employees in the bargaining unit." *Gilmer*, 500 U.S. at 24 (quoting *Alexander*, 415 U.S. at 59 n.19).

⁵² *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *McDonald v. City of West Branch*, 466 U.S. 284 (1984). These two cases similarly involved the issue of whether arbitration under a collective bargaining agreement precluded a subsequent statutory claim. In holding that the statutory claims there were not precluded, the Supreme Court noted, as they did in *Gardner-Denver*, the difference between contractual rights under a collective bargaining agreement and individual statutory rights, the potential disparity in interests between a union and an employee, and the limited authority and power of labor arbitrators. *Gilmer*, 500 U.S. at 35.

⁵³ *Id.* at 32.

⁵⁴ See generally *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *McDonald v. City of West Branch*, 466 U.S. 284 (1984).

⁵⁵ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

⁵⁶ *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

⁵⁷ *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

⁵⁸ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

misplaced. Those cases, the Court said, involved the issue of whether the arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims, not the enforceability of an agreement to arbitrate statutory claims.⁵⁹ The arbitration in those cases occurred in the context of the collective bargaining agreement, and thus there was concern about the tension between collective representation and individual statutory rights that is not applicable in the case at hand.⁶⁰ In addition, the *Gardner-Denver* cases were not decided under the FAA, which reflects a "liberal federal policy favoring arbitration agreements."⁶¹ Therefore, the Court concluded that the line of cases *Gilmer* relied upon provided no basis for refusing to enforce his agreement to arbitrate his ADEA claim.⁶²

In summary, the Court, in a 7-2 decision, ruled against *Gilmer* and concluded that he had "not met his burden of showing that Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act."⁶³ In so doing, it held that the FAA applies to agreements to arbitrate employment claims of age discrimination.⁶⁴ The Court observed that by signing an agreement to arbitrate a statutory claim, the claimant is not foregoing a substantive right, but instead is submitting the right to an arbitral forum, rather than a judicial one.⁶⁵ The Court also noted that "[W]e are well past the time when judicial suspicion of the desirability of arbitration and the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."⁶⁶ Thus, even though the Court understood that *Gilmer's* agreement to arbitrate was a condition of employment, one exacted for all securities dealers in the industry, it found that there was no reason to deny enforcement of such an agreement absent coercion or fraud.

⁵⁹ *Gilmer*, 500 U.S. at 33-34.

⁶⁰ *Id.* at 34-35.

⁶¹ *Id.* at 35 (quoting *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 625).

⁶² *Id.*

⁶³ *Id.* at 35.

⁶⁴ *Gilmer*, 500 U.S. at 33-35.

⁶⁵ *Id.* at 26.

⁶⁶ *Id.* at 34 n.5 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 626).

B. *The Impact of the Gilmer decision*

It is not entirely clear whether the *Gilmer* decision, decided pursuant to the Federal Arbitration Act,⁶⁷ applies to all employment disputes. According to section 1 of the FAA, "[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce."⁶⁸ Because *Gilmer's* agreement to arbitrate was pursuant to a securities registration agreement with the NYSE, rather than pursuant to the terms of the actual employment contract, the *Gilmer* Court did not directly address the issue of whether the FAA prohibited arbitration under a mandatory arbitration clause contained in a contract of employment.⁶⁹

Decisions subsequent to *Gilmer* still do not provide clear guidance in interpreting the exclusions contained in section 1 of the FAA.⁷⁰ However, this paper proceeds on the assumption that the FAA's exclusion does not apply to the vast majority of employment contracts, and therefore would allow the use of mandatory arbitration clauses in them. Regardless of whether or not arbitration clauses in employment contracts are enforceable, many employees may still be affected by mandatory arbitration clauses contained in third-party contracts. Indeed, employees may be affected in much the same way *Gilmer* was.

When an inventory of the reaction to this case is taken, it is clear that the impact of *Gilmer* has already been felt. Several post-*Gilmer* federal court cases have extended *Gilmer* to other federal civil rights statutes. For example, in *Alford v. Dean Witter Reynolds*,⁷¹ a pre-*Gilmer* case, the Fifth Circuit held that Title VII claims are not arbitrable under the FAA. That decision was vacated by the Supreme Court in light of *Gilmer*, and on remand the Fifth Circuit held that Title VII claims can be subjected to compulsory arbitration.⁷² In *Willis v. Dean Witter Reynolds, Inc.*,⁷³ the Sixth Circuit reached the same result. It should be kept in mind, however, that these cases have arisen in the context of security registration applications, not in purely private employment agreements.

⁶⁷ 9 U.S.C. §§ 1-307 (Supp. 1992).

⁶⁸ 9 U.S.C. § 1.

⁶⁹ *Gilmer*, 500 U.S. at 25 n.2.

⁷⁰ See generally *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991); *Dancu v. Coopers & Lybrand*, 57 FEP 689 (E.D. Pa. 1991); and *Spellman v. Securities, Annuities, and Insurance Services*, 10 Cal. Rptr. 2d 427 (Cal. 1992).

⁷¹ 905 F.2d 104 (5th Cir. 1990).

⁷² *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991).

⁷³ 948 F.2d 305 (6th Cir. 1991).

In addition, although the Supreme Court did not directly address the issue, it appears that most commentators in the employment field have considered the ramifications that exist if arbitration provisions in individual employment contracts are indeed enforceable. Numerous law review articles have been written on several aspects of the subject, the business community has thoroughly researched and explored the potential for establishing arbitration systems for the administrative resolution of statutory claims,⁷⁴ and a number of professional groups greatly concerned with the issue have created agendas to address specific questions that arise regarding the practical aspects of arbitrating in a non-union setting. The work of two such recently-developed groups is particularly notable.

First, at its convention in New Orleans in August of 1994, the Labor Arbitration and Law of Collective Bargaining Committee of the American Bar Association's Labor Law Section established a special task force to explore the development of a mutually acceptable procedure for resolving the whole range of workplace and related disputes, and specifically, to resolve issues relating to the increasing frequency of arbitration of statutory issues in a non-union setting.⁷⁵ The Task Force is comprised of representatives from the Labor Law Section of the ABA, the National Academy of Arbitrators, the American Arbitration Association, the Federal

⁷⁴ See Joseph F. Vella, on behalf of the Labor Policy Association, Testimony at the final public hearing before the Dunlop Commission (Sept. 29, 1994) (transcript available at the U.S. Department of Labor). More data needs to be collected before any hard conclusions can be drawn as to the extent employers have adopted mandatory arbitration for employment disputes. Indeed, on March 4, 1994, the House Education and Labor Committee requested the General Accounting Office (GAO) to initiate a comprehensive study of non-collectively bargained corporate personnel policies that compel arbitration of federal EEOC claims. See also Professor Samuel Estreicher, Testimony at the final public hearing before the Dunlop Commission (Sept. 29, 1994) (transcript available at the U.S. Department of Labor). Professor Estreicher asserts that the trend among companies today is to allow a third-party arbitrator to have the final say, at least in the company's in-house grievance procedures.

⁷⁵ *Labor Arbitration Panel Recommends Task Force on Nonunion Arbitration*, 1994 DLR 151 d18, (The Bureau of National Affairs, Inc.), August 9, 1994. The creation of the task force was inspired by the presence of Arnold Zack, President of the National Academy of Arbitrators, who presented his personal views at the August 8th meeting. He stated that the members of the National Academy of Arbitrators are comfortable in interpreting the four corners of a collective bargaining agreement but do not necessarily have the training and experience to substitute for the legal process in interpreting statutes. Zack also noted that only ten percent of the National Academy of Arbitrators' arbitrators are women and said that the profession needs more women and minority arbitrators. Finally, he said that he would like to see the National Academy of Arbitrators develop mutually acceptable due process standards for employer-provided arbitrations in the statutory field. *Id.*

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Mediation and Conciliation Service, and the Society of Professionals in Dispute Resolution.

Second, the Commission on the Future of Worker-Management Relations (Dunlop Commission) is also undertaking the task of addressing similar issues.⁷⁶ The ten-member Commission, chaired by former Secretary of Labor John T. Dunlop, has as part of its overall mission, ventured into determining ways that workplace disputes can be directly resolved by the parties rather than through recourse to the courts.⁷⁷ In its interim fact-finding report issued in early June of this year, the Commission said that "private arbitration has served as an effective and flexible process for resolving workplace issues covered by collective bargaining agreements."⁷⁸ In so concluding, the panel report also pointed out the possibility for the wider use of arbitration in the non-union setting. The testimony given before the Dunlop Commission regarding alternative forms of dispute resolution in the workplace⁷⁹ is of particular relevance to Section IV of this Note and will be referred to throughout.

It should be emphasized that the Dunlop Commission did not restrict itself to the assumption that arbitration provisions in private employment contracts are enforceable. Rather, it addressed a whole host of issues, including the question of whether arbitration and other forms of dispute resolution should even be permitted in the non-union employment context. The third question put before the Commission and the responses it elicited are the main aspect of the Dunlop Commission material that will be used. The issue was stated as follows: What (if anything) should be done to increase the extent to which workplace problems are directly resolved by the parties themselves, rather than through recourse to state and federal courts and government regulatory bodies?

C. Concerns That Have Arisen Because of *Gilmer*

Given the widespread reaction and response to the *Gilmer* decision, it is clear that *Gilmer* presents many unresolved questions with respect to the use of arbitration to resolve employment claims based on statutory rights. As *Gilmer* himself recognized, there are several concerns regarding the adequacy of arbitration procedures in dealing with such disputes.⁸⁰ Such

⁷⁶ *Dunlop Panel Hears Alternative for Resolving Workplace Disputes*, 1994 DLR 188 d31 (October 5, 1994).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* A six-hour hearing, which was held on September 29, 1994, was the final public testimony given before the Dunlop Commission. *Id.*

⁸⁰ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991).

concerns include the possibility of biased arbitrators, limited discovery, undue secrecy in decision-making, and inadequate relief—all of which were identified in detail above.⁸¹ Other concerns regarding the procedures used in arbitration include its less restrictive evidentiary standards, its informal nature, and its tendency to preclude employees' traditional access to the due process and fairness of judicial appeal.⁸²

In addition to the procedural concerns cited in the above paragraph, many other concerns have been raised. First, it is asserted that the rules of an arbitration system should be responsible for governing the practical aspects involved in arbitrating, such as locating and selecting a suitable, neutral arbitrator and deciding who pays him or her for the services provided. Second, many questions are posed regarding the creation of arbitration programs: who should create the program, under what rules and procedures the arbitration should proceed, and whether certain minimum requirements should be included in the agreement in order to provide due process. Third, because the inclusion of arbitration provisions in employment contracts may actually increase the number of employment disputes being brought for resolution—because of the purported easy access to the system—arrangements must be made to ensure that there are enough qualified arbitrators to address the increased load.⁸³ Fourth, questions exist as to the finality of an arbitrator's decision and when, if ever, it may be appealed. Fifth, whether or not an arbitrator is limited in his power to award damages, the perception is that the tendency may be to exercise more restraint than juries in giving awards.⁸⁴ Finally, the purported existence of unequal bargaining power between employers and employees is brought up as a reason to be hesitant to enforce arbitration agreements.⁸⁵ Although a host of other issues exist, only those cited in the preceding two paragraphs will be addressed and analyzed in detail in Section IV of this Note.

⁸¹ *Gilmer*, 500 U.S. at 31-32. See *supra* textual discussion at pp. 156-58 for a detailed description of these issues.

⁸² Zaak, *supra* note 1..

⁸³ John M. Husband & Brian M. Mumaugh, *Arbitration of Employment Disputes After Gilmer*, 20 COLO. LAW 2277, 2289 (1991).

⁸⁴ *Id.*

⁸⁵ *Gilmer*, 500 U.S. at 32-33.

III. HOW ARBITRATION WORKS

A. *The Basic Idea Behind Arbitration*

Anglo-American jurisprudence has long favored methods that accelerate the resolution of disputes, preferably by means short of actual litigation.⁸⁶ Thus, the resolution of disputes through methods of alternative dispute resolution rather than through litigation is favored.⁸⁷ Because it has received a new impetus in recent years as an alternative means of resolving disputes, one of the most frequently used methods has been arbitration.⁸⁸

Arbitration is a form of alternative dispute resolution in which one or more disinterested persons, known as arbitrators, investigate and determine a resolution to a disputed matter which has been submitted to them for adjudication by the parties involved in the controversy.⁸⁹ All parties to an action must expressly agree that their dispute will be subject to an arbitration hearing in lieu of a judicial proceeding, as the decisions of arbitrators, termed "awards,"⁹⁰ are for the most part binding upon the parties.⁹¹ Arbitration may, in fact, be preferred to a judicial proceeding because it allows the parties to achieve a final resolution of their differences in a less expensive, more expeditious, and less formal manner than is normally available in ordinary court proceedings.⁹²

Generally, unless the parties provide otherwise, prehearing discovery is not available in conventional labor arbitration.⁹³ In addition, the rules of evidence typically do not apply. Because arbitration is typically less formal than litigation, some arbitrators are apt to receive into evidence almost anything for what it is worth. Finally, arbitrators are generally empowered with the same remedial power as judges. This includes, for example, the authority to award backpay, reinstatement, front pay and other "make whole" remedies, and compensatory damages.

Arbitrators may or may not have had formal instruction in the law.⁹⁴ They are generally not required to write opinions or otherwise give the reasoning behind their decisions, and there is no requirement that a

⁸⁶ 4 AM. JUR. 2d *Alternative Dispute Resolution* § 7 (1995).

⁸⁷ *Id.*

⁸⁸ 5 AM. JUR. 2d *Arbitration and Award* §§ 1-189 (1962).

⁸⁹ *Id.* at § 1 (1962).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Stephen P. Younger, *Structuring ADR Proceedings*, N.Y.L.J., Sept. 20, 1993, at 1.

⁹⁴ 5 AM. JUR. 2d *Arbitration and Award* § 2 (1962).

complete record of the arbitrated proceedings be maintained.⁹⁵ "The arbitrator need not follow the law, may disregard the evidence and published legal or arbitration decision precedents, and may decide the case according to his own concept of fairness, justice, or equity."⁹⁶ Moreover, the judicial appealability of an arbitration award is very limited and such an award will be set aside only when there exists a clear case of illegality, fraud, misconduct, gross mistake, or error.⁹⁷

The majority of these characteristics clearly reflect the general goal of Alternative Dispute Resolution (ADR), which is not only to "arrive at a decision about who is right and who is wrong,"⁹⁸ as in litigation, but also to "produce a more durable solution by restoring, preserving, or enhancing the parties' relationship."⁹⁹ As previously mentioned, such a goal is of particular importance in union setting disputes where the disputants may have to work together in the future.¹⁰⁰

⁹⁵ 5 AM. JUR. 2d *Arbitration and Award* § 2 (1962).

⁹⁶ Joseph Brandschain, *Preparation and Trial of a Labor Arbitration Case*, 18 PRAC. LAW. 17, 24 (1972).

⁹⁷ 6 C.J.S. *Arbitration* §§ 149-50 (1975).

⁹⁸ Kenneth R. Feinberg, *Mediation - A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S6 (Supp. 1989).

⁹⁹ Kathleen A. Devine, Note, *Alternative Dispute Resolution: Policies, Participation and Proposals*, 11 REV. LITIG. 83, 89 (1991).

¹⁰⁰ See Deborah A. Schmedemann, *Reconciling Differences: The Theory and Law of Mediating Labor Grievances*, 9 INDUS. REL. L.J. 523, 526-30 (1987); Thomas A. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution: A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461, 471 (1984). Arbitration differs from other forms of ADR such as mediation, negotiation, and summary jury trials in that, unlike the latter methods, arbitration is an adjudicatory process and the decisions of an arbitrator bind the parties. Mediation and negotiation are similar to arbitration in that they are informal processes where each party is given the opportunity to present its case. But, unlike arbitration, mediation and negotiation are used solely to open the lines of communication between the disputants via a neutral third party whose conclusions have no legal effect. In summary jury trials, the trial experience is simulated; evidence is given in the form of statements by attorneys to a six-member jury. Unlike arbitration, though, live testimony is forbidden. In addition, in a summary jury trial, jurors are not told that their verdict is non-binding on the parties, who will simply use the damage award as a guide for settling the case. Thus, the greatest difference between arbitration and most other methods of ADR is that the decision of the arbitrator is legally conclusive, unlike other forms of ADR, in which the triers of facts are generally not empowered to decide disputes, but only to facilitate settlement.

B. Arbitration in the Traditional Union-Management Context

Employers and unions who are in a collective bargaining relationship typically have negotiated a well-defined procedure for resolving disputes which arise under their labor agreement. The process for dealing with grievances¹⁰¹ is itself a term and condition of employment under the National Labor Relations Act,¹⁰² and therefore, the parties are obligated to bargain in good faith to establish its components.¹⁰³ Such bargaining has tended to produce a pattern for handling grievances which includes both formal and informal elements.

The first step is normally the filing of a written grievance by either the employee or the union identifying the alleged contract violation. There is typically a short time limit imposed in order to eliminate stale complaints.¹⁰⁴ Regardless of who files the complaint, it is the union, as signatory to the collective bargaining agreement, which is in control of processing grievances.¹⁰⁵ Employers have the right to resolve grievances voluntarily with individual employees as long as the result is not inconsistent with the contract,¹⁰⁶ but grievance resolution with the union is the norm.¹⁰⁷ The employee cannot insist that the union take any particular action, but in turn, the union must satisfy a duty of fair representation to employees in handling their claims.¹⁰⁸

In essence, the grievance procedure in a collective bargaining agreement is itself an ADR technique, one that is much like the process of negotiation in litigation. Similarly, as in the case of litigation, there is a point at which the parties may find themselves unable to reach a mutually satisfactory settlement. In the context of a lawsuit, this means that litigation will most likely follow. In contrast, in the context of a dispute under a collective bargaining agreement, litigation is not usually the result. Most collective bargaining agreements contain a provision requiring the

¹⁰¹ FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS*, at 155 (4th ed. 1985). "The term [grievance] connotes conflict and irritation, and thus could be defined as any 'gripe' or any type of complaint by an employee or a union against the employer or by an employer against his employee or the union." *Id.*

¹⁰² National Labor Relations Act, 29 U.S.C. § 158(d) (1988).

¹⁰³ National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1988). This section of the Act creates a duty to bargain in good faith over the terms and conditions of employment.

¹⁰⁴ ELKOURI & ELKOURI, *supra* note 101, at 165-67.

¹⁰⁵ See *Vaca v. Sipes*, 386 U.S. 171 (1967).

¹⁰⁶ National Labor Relations Act, 29 U.S.C. § 159(a) (1988).

¹⁰⁷ ELKOURI & ELKOURI, *supra* note 101, at 165-66.

¹⁰⁸ See *Vaca v. Sipes*, 386 U.S. 171 (1967).

arbitration of unsettled grievances in lieu of litigation.¹⁰⁹ In this process, a third-party neutral is selected through agreed-upon procedures.¹¹⁰ The neutral conducts a hearing at which all relevant evidence and arguments are received, and ultimately issues an award resolving the dispute. The award, moreover, is for all practical purposes final and binding, with very limited opportunities for review available.¹¹¹

The process of grievance arbitration has become firmly embedded in the unionized sector of the employment population.¹¹² There appears to be a strong consensus that it is a far less expensive and much more expeditious process for dispute resolution than traditional litigation.¹¹³ The proceedings are much less formal than a trial, and many employers and unions have agreed to further cost-saving tactics, such as dispensing with transcripts, and relying upon union business agents and personnel officers to present simple cases rather than employing the services of attorneys. If frequency of use is a relevant measure, one would have to conclude that the system is successful.¹¹⁴

As can be discerned from the above, arbitration under collective bargaining agreements is a unique form of alternative dispute resolution. Although labor arbitration procedures are similar to procedures used in other arbitral forums, the role of arbitration under a collective bargaining agreement is different from its role in a non-union setting.¹¹⁵ The collective bargaining agreement is more than a contract; it is a generalized code that governs the entire employment relationship.¹¹⁶ Arbitration is a means of solving the unforeseeable by molding a private sort of law that effectively shapes the common law of a particular industry or a particular plant.¹¹⁷

¹⁰⁹ ELKOURI & ELKOURI, *supra* note 101, at 6. A study made by the Bureau of Labor Statistics of agreements in effect on or after July 1976 indicate that almost 96 per cent of collective bargaining agreements in the nation's most important industries provided for arbitration as the terminal point of the grievance machinery. ELKOURI & ELKOURI, *supra* note 101, at 6.

¹¹⁰ *Id.* at 135-37.

¹¹¹ *Id.* at 41.

¹¹² *Id.*

¹¹³ Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 475 (1992).

¹¹⁴ ELKOURI & ELKOURI, *supra* note 101, at 6.

¹¹⁵ G. Richard Shell, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts*, 68 TEX. L. REV. 509, 519 (1990).

¹¹⁶ *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1960).

¹¹⁷ *Id.* at 579.

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The arbitrator plays a special role, as his power is generally limited to interpreting the collective bargaining agreement.¹¹⁸ The Supreme Court has held that although arbitrators can look outside the contract for guidance, their role is limited to interpretation and application of the collective bargaining agreement.¹¹⁹ An arbitrator does not generally have jurisdiction to apply public law. For this reason, as well as others,¹²⁰ courts are unwilling to defer to a labor arbitrator's decision when statutory rights are involved, and thus exercise de novo review of statutory claims. Under this model, arbitrators do not have the authority to resolve specific statutory rights that may conflict with the bargain between the parties.¹²¹

In discrimination cases, courts are especially concerned about protecting individual rights. In arbitration under a collective bargaining agreement, however, the interests of individual employees are often subordinated to the collective interests of all the members of the bargaining unit.¹²² When an employee's statutory rights are at stake, the tension between collective interests and an individual's interests may be detrimental to the employee asserting those rights.¹²³ Thus, the union may not vigorously assert an employee's statutorily granted right if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole.¹²⁴ The unique function of arbitration in collective bargaining agreements has led the Supreme Court to limit the scope of labor arbitration in that particular arena.

¹¹⁸ ELKOURI & ELKOURI, *supra* note 101, at 29-30.

¹¹⁹ *Id.*

¹²⁰ Other reasons include the expertise that courts have regarding statutory issues and the fear that statutory claims may not be fully litigated by the union.

¹²¹ See generally ELKOURI & ELKOURI, *supra* note 101; Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 (1974). This situation arises when the collective bargaining agreement and the law conflict. From an arbitrator's perspective, there are two possible points of view. On one hand, the arbitrator can deny the grievance, thereby giving respect to the law and ignoring the collective bargaining agreement. On the other hand, the arbitrator can grant the grievance and, in turn, respect the collective bargaining agreement and ignore the law. Arbitrators appear to be split in how to address this situation. See also Mittenthal, *The Role of Law in Arbitration*, Proceedings of the Twenty-First Annual Meeting 42 (1968) for a thorough discussion.

¹²² Shell, *supra* note 115, at 519.

¹²³ Barrentine v. Arkansas Best Freight System, Inc., 450 U.S. 728, 742 (1981).

¹²⁴ *Id.* at 750.

C. Advantages and Disadvantages of Arbitration in the Union Setting

Proponents of arbitration maintain that the benefits which it affords cause it to be an attractive alternative to litigation.¹²⁵ One of arbitration's key advantages is expediency: whereas a claim may take years to be resolved in the courts, arbitrators typically adjudicate claims within a matter of months.¹²⁶ Another advantage to arbitration is that it is generally less expensive than litigation. Legal counsel is not required, and often is not used. Further, if a party elects to retain such counsel, arbitration's expediency and limited discovery keep costs to a minimum.¹²⁷

In addition, arbitration is much more satisfactory than litigation when a "decision by men with a practical knowledge of the subject is desired"¹²⁸ and when it is necessary that the parties' relationship must endure. This, of course, is directly applicable when it comes to resolving disputes in the collective bargaining context. The Supreme Court itself has stated that arbitration is superior to litigation in this context:

The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of the courts. . . . The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.¹²⁹

¹²⁵ W. John Moore, *Business Sees Victory in Court Ruling*, NAT'L L.J., July 13, 1991, at 1751.

¹²⁶ AM. JUR. NEW TOPIC SERVICE, *Alternative Dispute Resolution* §7 (1985).

¹²⁷ Roger L. Anderson & James W. Robinson, *Is Arbitration the Answer in Wrongful Termination Cases?* 42 LAB. L.J. 121, 121 (1991).

¹²⁸ ELKOURI & ELKOURI, *supra* note 101, at 7 (quoting *Webster v. Van Allen*, 216 N.Y.S. 552, 554 (N.Y. App. Div. 1926)).

¹²⁹ *Id.* at 7-8 (quoting *United Steelworkers v. Warrior Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960)).

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Going hand in hand with this, arbitration is also an attractive option when there are difficult technical issues involved. This is so because the parties can choose an arbitrator who has expertise in that particular area.¹³⁰ Specifically, the parties have the ability to contact a dispute resolution organization that specifically deals with arbitrators, and have it send both parties a list of proposed arbitrators, with background material on each.¹³¹ This is particularly advantageous as it reduces the need for expert testimony.¹³²

Another advantage is that because the parties in a union setting arbitrate voluntarily, compliance with an award is achieved in most instances. Only infrequently is court action required for the enforcement or vacation of awards.¹³³ In addition, because the decision of the arbitrator is for the most part final and binding, the uncertainty of the appeals process is typically avoided.¹³⁴

Arbitration is private and confidential. Many parties do not want the subject matter of their complaints spread all over the court records. Thus, if arbitration is resorted to, the proceedings are typically entirely private, and so is the arbitrator's decision.¹³⁵ Arbitrators also pay less attention to the rules of evidence. This is considered by some commentators to be an advantage of arbitration as it makes it possible to get to the heart of the matter quickly.¹³⁶

Although some commentators point to the lack of discovery opportunities provided for in arbitration, others see it as a distinct advantage. This becomes clear, they assert, when the cost of court discovery is examined. If a party were to go through normal court discovery, depending upon the case, the expense for it could end up being close to the maximum amount of money that can be recovered.¹³⁷ In addition, the fact

¹³⁰ Stephen B. Goldberg et al., *Litigation, Arbitration, or Mediation: A Dialogue*, 75-JUNE A.B.A. J. 70, 71 (1989).

¹³¹ *Id.*

¹³² Michael W. Hawkins, *Alternative Dispute Resolution: An Alternative for Resolving Employment Litigation and Disputes*, 20 N. KY. L. REV. 493, 495 (1993).

¹³³ See generally ELKOURI & ELKOURI, *supra* note 101, 23-95 (Supp. 1985-89).

¹³⁴ Hawkins, *supra* note 132.

¹³⁵ *Id.*

¹³⁶ Goldberg, *supra* note 130, at 72.

¹³⁷ *Id.* Normal court discovery consists of an average of 4-5 depositions, plus five days in which to try the case. This can cost as much as \$50,000. If the potential for recovery is near or less than that dollar amount, it does not make sense to litigate. With the limited discovery involved with arbitration, a claimant can expect two depositions, and the case could be tried in two days time at a cost of \$20,000. In addition, although with arbitration there

that arbitrators are not bound to the rules of evidence acts as a counterweight to balance out reduced discovery.¹³⁸

Opponents of arbitration point to a number of concerns and disadvantages. Critics focus on the lack of information in arbitration proceedings.¹³⁹ Unlike judicially available mechanisms for obtaining information, complainants bringing their cases before an arbitrator typically do not have the right to engage in extensive discovery or compel the production of documents.¹⁴⁰

In addition, opponents have also criticized the secrecy involved in arbitration as it avoids the negative aspects of public knowledge. In so doing, it may shield unfair employers from public accountability as arbitrated disputes are usually held in confidential forums.¹⁴¹ As a result, employers who engage in unfair employment practices may be able to escape the adverse publicity that would otherwise hold them accountable for their actions.¹⁴² In relation to the above point, because arbitration decisions do not become generally available as a result of arbitrated claims, they cannot be used as precedent.¹⁴³ Thus, the scope of arbitration is typically extremely narrow as arbitrated complaints are often dealt with on an individual basis so that the outcome will only affect the individual bringing the action.¹⁴⁴

Furthermore, opponents also criticize the lack of regulatory controls over the process, the limited scope of judicial review, and arbitrators' lack of legal experience.¹⁴⁵ Finally, many commentators also believe that the "outcomes of ADR do not give proper deference to 'substantive legal norms.'" ¹⁴⁶

exists an administrative fee which is paid to the organization supplying the arbitrator, it is usually less than \$2,500. Goldberg, *supra* note 130, at 72.

¹³⁸ Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991).

¹³⁹ Anderson & Robinson, *supra* note 127.

¹⁴⁰ Carol-Teigue J. Thomas, Gilmer v. Interstate/Johnson Lane Corporation: *When is an Employee's Right to a Judicial Forum Precluded by an Arbitration Agreement?* 27 NEW ENG. L. REV. 791, 795 (1993).

¹⁴¹ Gilmer, 500 U.S. at 31.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Thomas, *supra* note 140.

¹⁴⁵ Arthur Eliot Berkeley & E. Patrick McDermott, *The Second Golden Age of Employment Arbitration*, 43 LAB. L.J. 774 (1992).

¹⁴⁶ Richard E. Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 OHIO ST. J. ON DISP. RESOL. 157, 164 (1989).

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IV. ISSUES AND CONCERNS REGARDING THE ARBITRATION OF STATUTORY EMPLOYMENT CLAIMS

Whatever the outcome of the evolution whose beginning is marked by *Gilmer*, it is clear that a major shift in the playing field of arbitration may be about to take place. There exists an increasingly diverse American work force and the trend favors enhanced statutory protection of individual employment rights. At the same time, state and federal courts are severely overloaded and the potential for increased numbers of employment discrimination and wrongful discharge actions that are likely to result will leave the Supreme Court in search of viable alternative dispute resolution options.

Assuming that arbitration received the stamp of approval in *Gilmer*, a new arbitral forum will have to be created for the adjudication of statutory-based claims of discriminatory treatment and wrongful termination. It is in the mutual interest of both the employee and the employer to resolve any such disputes through a procedure that is fair, private, expeditious, economical, final, and most importantly, less burdensome than litigation. This section will attempt to offer suggestions for the creation of such a procedure.

A. *Creating a Program*

In order to implement an arbitration system, a program or agreement must be designed in order to provide direction and specific guidelines under which the parties will be governed. The first issue that arises regarding this topic is whether employees should be permitted to participate in the creation of pre-dispute arbitration agreements or whether employers may create them unilaterally. In the union setting, employers and union have typically negotiated a well-defined procedure for resolving disputes which may arise under the collective bargaining agreement. Although the employee does not usually have the opportunity to participate in the negotiations in an individual capacity, an advantage still exists because he or she does have a voice through the union. Currently, there are two different viewpoints on who should have input in determining the terms of pre-dispute arbitration agreements in a non-union setting.

One view is that employees should not be involved in the process and several reasons are forwarded in supporting this notion. First, it is argued that the difficulty involved in reaching a consensus in the design of an arbitration program can not be overlooked.¹⁴⁷ Adoption generally comes only after a great deal of internal debate within the company about what

¹⁴⁷ See Vella, *supra* note 74.

type of system can be used.¹⁴⁸ Therefore, because most employees know nothing about or have had no experience with alternative dispute resolution, the difficulty of choosing among the many different options would be multiplied greatly if employee involvement were mandated.¹⁴⁹ Furthermore, while employee involvement potentially could be helpful, the issues are alleged to be so complex that expertise in the substantive area would be more valuable in terms of input.¹⁵⁰

Second, it is asserted that with no union it would be too difficult to decide which employees the employer should deal with.¹⁵¹ In addition, even if a fair system was set up for choosing which employees could participate, the idea is not practical for the following reason. Today's workforce is more transient than in the past and workers can expect to have as many as seven different jobs in their worklife.¹⁵² Thus, the attachment of a worker to a single employer is much less of a factor.¹⁵³ "It therefore makes less sense to design a program which requires the formal input of a group of employees who may only represent a snapshot of the workforce continuum and who may be with another employer when the program is implemented."¹⁵⁴

Third, there is a concern under section 8(a)(2) of the National Labor Relations Act as to whether an employer is permitted to negotiate about wages, hours, and working conditions with its non-unionized employees.¹⁵⁵ While a case can be made that employee involvement in designing an arbitration program does not violate section 8(a)(2), the uncertainty over the issue is a disincentive for many employers to involve employees in the process.¹⁵⁶

The basic idea behind this view is that as long as the program created is a fair one, it should be used to resolve statutory claims despite the fact that employees were not allowed to have input in designing the program. Advocates of this view allege that if employee involvement were mandatory for an arbitration program to be upheld, then many employers would opt out of alternative dispute resolution altogether.¹⁵⁷

¹⁴⁸ See Vella, *supra* note 74.

¹⁴⁹ *Id.*

¹⁵⁰ Lawrence Z. Lorber, on behalf of the National Association of Manufacturers, Testimony at the final public hearing before the Dunlop Commission (Sept. 29, 1994) (transcript available at the U.S. Department of Labor).

¹⁵¹ Vella, *supra* note 74.

¹⁵² Lorber, *supra* note 150.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Vella, *supra* note 74..

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

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The other view, obviously, is that employees should be allowed to contribute in designing a program. The reasons supporting that position are as follows. First, it is argued that an employer's unilateral establishment of an arbitration program raises issues of equity;¹⁵⁸ the prospect of allowing employers to force employees into arbitration procedures—no matter how fair they are—is inherently coercive in a non-union setting.¹⁵⁹ This inherent power imbalance between the employer and the employee is said to be a fatal flaw when it comes to constructing a workable, private, non-union arbitration program that is fair.¹⁶⁰ In addition, it is pointed out that in the tradition of the adversaries in the labor-management union setting, the parties have developed their own structure of arbitration. It is suggested that a similar system might likewise be shaped by the parties in this new employment law setting.

Of the two views, the first appears to have more strength. As discussed previously, allowing employees to contribute may complicate the process rather than simplify it. In addition, if mandated employee participation forces employers to opt out of arbitration programs altogether, then everyone loses. Employers should therefore be permitted to decide whether they want employee participation in the creation of the program or not. As indicated, one problem that could arise is getting around section 8(a)(2) of the National Labor Relations Act. Because the concerns raised appear to be valid ones, it is not totally clear how an employer who wants employee participation could circumvent this.¹⁶¹ Finally, although the voice that employees were provided with in the union setting is lost, there are other ways to assure that their interests are being protected and that their needs are being met. How this can be accomplished and how the inherent power imbalance between employer and employee can be equalled out will be discussed in detail in the remainder of Part A.

The second issue that arises regarding this topic is whether there should be a set minimum for standards and provisions under these agreements or whether flexibility should be maintained in order to accommodate the differences in approach which may be taken by different organizations. In the union setting, there are no set minimums for what must be included in a collective bargaining agreement regarding how grievances should be handled. Rather, the employer and the union are at an advantage in that they

¹⁵⁸ Zack, *supra* note 1.

¹⁵⁹ Coalition of Labor Union Women, Testimony at the final public hearing before the Dunlop Commission (Sept. 29, 1994) (transcript available at the U.S. Department of Labor).

¹⁶⁰ American Nurses Association et al., Testimony at the final public hearing before the Dunlop Commission (Sept. 29, 1994) (transcript available at the U.S. Department of Labor).

¹⁶¹ Zack, *supra* note 1. Mr. Zack suggests that an amendment providing an exemption from section 8(a)(2) could be the answer.

may freely bargain to establish its components. As above, two different viewpoints exist regarding this issue.

One view is that flexibility should be retained in order to address legitimate differences in approach that may be taken by different employers. It is asserted that this is necessary because of the difficulty involved in reaching a consensus in the design of an arbitration program amongst employers.¹⁶² Although some incorrectly think that there is a mass movement in the employer community toward some fairly uniform alternative dispute resolution systems, the different views within employer groups indicate that such a conclusion is greatly overstated.¹⁶³ Rather, the types of programs that have been adopted vary greatly from employer to employer.¹⁶⁴ Consequently, if a "one-size-fits-all" approach is taken, adoption of an arbitration program may never happen. Finally, it is argued that in terms of regulation, we should be mindful that it comes at a price. It could end up detracting from the traditional advantages of arbitration and possibly discouraging its utilization.

The other viewpoint on this issue is that guidelines should be established in order to ensure that an arbitration system is fair. Such regulation can be established by an agency that has expertise in alternative dispute resolution or by legislation.¹⁶⁵ The idea behind this view is that once the minimum due process guidelines have been met, an employer should then be given sufficient leeway to design a program that best meets the needs of the particular employment situation.¹⁶⁶

In addition, if an employer's program complies with the minimum requirements, and thereby presumably provides adequate protection for employees, it would be deemed valid and would have the endorsement of the governing agency.¹⁶⁷ Any resolution of a claim that does not include these appropriate safeguards, however, should be deemed unenforceable under the agreement.¹⁶⁸ Penalty provisions for successful challenges to programs that do not meet the minimum requirements would mean employers would risk appeals which might overturn their procedures and result in de novo litigation of the claim with potentially costly jury awards.¹⁶⁹

¹⁶² Vella, *supra* note 74.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Zack, *supra* note 1.

¹⁶⁸ Women's Legal Defense Fund, Testimony at the final public hearing before the Dunlop Commission (Sept. 29, 1994) (transcript available at the U.S. Department of Labor).

¹⁶⁹ Zack, *supra* note 1.

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Finally, advocates of this view, while pushing for regulation, assert that only the safeguards that are truly necessary should be implemented. Like everyone else involved in the debate, they are forthright in recognizing that regulation comes at a price because it has the potential to detract from arbitration's traditional advantages such as its informality.¹⁷⁰

It is my suggestion that regulation in this area should be facilitative. "The goal of the law should be to make it possible for the parties to craft mandatory arbitration agreements that can provide a binding, comprehensive resolution of employment claims, under certain safeguards."¹⁷¹ Insistence on rigid formats, however, should be avoided. Employers differ in their internal personnel practices, employee and managerial capability, and work culture. Therefore, once the minimum requirements have been fulfilled in order to ensure that an arbitration system is fair, an employer should be allowed sufficient leeway to design a system that best meets the needs of his or her particular environment. Although there are no set minimums for procedures in the union setting, they are not really necessary; employees' interests are adequately protected by their representative. In a non-union setting, because mandatory employee participation is not required, compliance with minimum requirements serves as a substitute for input and representation.

B. Choosing an Arbitrator

One of the greatest concerns to those worried about the spill-over impact of employer-created systems is maintaining the credibility of truly impartial arbitration by providing access to qualified, unbiased arbitrators. That cannot be achieved if the employer alone is entitled to designate its choice of who is to be the arbitrator. Nor can it be achieved by allocating all cases to the present cadre of union arbitrators. Numerous problems must be addressed in assuring the neutrality, professional competence, and acceptability of the arbitrators in such plans. In the union setting, the arbitrator is selected through agreed-upon procedures. Because these procedures are a product of bargaining, both the employer and the employee representative have a say in how arbitrators are chosen. Thus, both parties retain the advantage of being able to control that aspect of the process.

¹⁷⁰ Professor Samuel Estreicher, Testimony at the final public hearing before the Dunlop Commission (Sept. 29, 1994) (transcript available at the U.S. Department of Labor).

¹⁷¹ *Id.*

1. Arbitrator Pool

One view on this subject is that the current pool of arbitrators should be used. First, it is suggested that individual neutral designating agencies might opt to create their own neutrals for selection in such disputes.¹⁷² Alternatively, to assure the broadest pool of experienced professional arbitrators, it is proposed that all of the participating designating agencies combine their rosters into a single pool.¹⁷³ This would embrace all those who are currently engaged in the practice of employment and labor-management arbitration, and those who have sufficient acceptability to be admitted to such rosters. Presumably, many of the professional arbitrators are currently on more than one such roster. Such a pool would probably number upward of 5,000 names nationally, although admittedly, most of those arbitrators would be ones that have worked as labor-management neutrals.¹⁷⁴

Second, advocates of this view recommend that the pool not be restricted to lawyers.¹⁷⁵ It is true that the burdens imposed on the arbitrators will require application of, and conformity to, statutes and regulations; and that endorsement of arbitral decisions will be dependent on compliance to legal standards. However, some of the most renowned arbitrators, with the sharpest legal minds, are not members of the bar.¹⁷⁶ To lose access to experienced non-lawyer arbitrators with extensive employment law experience would be unfortunate. Finally, supporters of this view are forthright in recognizing that if current arbitrators are used in the non-union setting, an update in training and qualifications may be necessary.¹⁷⁷ The self-interest of arbitration organizations can be counted on to encourage this by keeping active on their rosters only those members found to be acceptable to both employers and employees.¹⁷⁸

The other view is that new arbitrators are necessary to address employment disputes in the non-union setting. Supporters of this view assert that the current labor-management arbitrators may not be the arbitrators of choice for the new procedures.¹⁷⁹ Arbitrators are viewed by many to be ignorant of the law and too wedded to the collective bargaining standard of "just cause" to be acceptable for statutory enforcement issues.

¹⁷² Zack, *supra* note 1.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Zack, *supra* note 1..

¹⁷⁸ Estreicher, *supra* note 170.

¹⁷⁹ Zack, *supra* note 1.

Notwithstanding the above, many of the current arbitrators "lack both the interest and commitment to venture into the new field of statutory responsibility, and are content to stick with the labor-management [field] without risking the agency or court reversals that might come with" arbitrating in this new area.¹⁸⁰

Advocates of this view also express concern about the composition of the current pool. A recent finding by the General Accounting Office stated that 89 percent of the arbitrators used in the securities industry in 1992 were white men with little experience in labor law.¹⁸¹ This finding implies that current arbitrator pools lack sufficient female and minority arbitrators to meet the expected qualifications for resolving the anticipated volume of sex, race, and ethnic discrimination issues.

Finally, "the needs [of the] new players, as [was] true of the needs for the original labor-management parties, may lead them to develop a wholly different roster of acceptable arbitrators."¹⁸² Indeed, if statutory arbitration is adopted on a wide scale, it could lead to an entirely new generation of neutrals quite different from what the public currently perceives as being society's labor arbitrators.

It appears that the best approach to maintaining a credible arbitrator pool is to take a portion of each of the views asserted and combine them for optimal results. As stated above, many of the current arbitrators have extensive experience in employment law. To not utilize them simply because they are a part of the old labor-management regime is impractical. In addition, because it is in the best interest of the arbitration associations to keep only acceptable arbitrators on their rosters, the fear of receiving an arbitrator who is not capable of arbitrating statutory employment disputes is minimized. However, because of the indication that many of the current arbitrators lack desire to be a part of the new system, the search for new arbitrators who have an interest in statutory arbitration should continue. This is especially true in light of the lack of female and minority representation. By utilizing such a compromise, the parties involved are assured of having the strongest possible roster from which to choose.

2. Training and Qualification

There are no conflicting viewpoints on this subject. All interested parties agree that some sort of training and qualification system is necessary in order to assure the disputants that this new system of arbitration has integrity. Because the effectiveness of this new arbitral forum is dependent

¹⁸⁰ Zack, *supra* note 1.

¹⁸¹ American Nurses Association et al., *supra* note 160.

¹⁸² Zack, *supra* note 1.

on providing qualified and acceptable arbitrators, maintaining the credibility of such a private alternative to statutory entitlement requires that arbitrators be knowledgeable of the governing regulations, statutes, and court decisions.¹⁸³ Most current arbitrators do not have the requisite familiarity with the above to provide a viable alternative to litigation.¹⁸⁴ Therefore, providing the aforementioned information should be an integral part of their training.

To provide the specialized knowledge required of such neutrals, it has been proposed that a comprehensive training program be created to familiarize arbitrators with the requirements of the regulations and statutes and to introduce them to applicable precedent. Once this training is completed, the arbitration associations will be able to establish rosters of individuals with skills pertinent to the particular issue being arbitrated.¹⁸⁵ Training could be provided by the government agency that will oversee statutory arbitration or it could be provided by the arbitration associations themselves utilizing as trainers those who have experience with the substantive issues of employment law and the procedural process of arbitration.¹⁸⁶ The designated government agency in conjunction with the arbitration associations could jointly develop standards for such training, and permit arbitrators who have completed such training to list those courses on their resumes and panel cards in order to demonstrate the extent of their expertise to potential employers.¹⁸⁷

As previously mentioned, there is a lack of female and minority arbitrators to meet the expected qualifications for resolving the anticipated volume of sex and race discrimination issues.¹⁸⁸ To assure the confidence of the claimants, particular attention should be paid to augmenting the numbers of women and minorities in the arbitration pool. Unfortunately, the current labor-management arbitration groups are not representative of the population at large.¹⁸⁹ It has been suggested that there should be exploration of a special program whereby arbitration associations can recruit and train such individuals in order to assure the availability of a broader pool of acceptable arbitrators.¹⁹⁰ For those recruited without prior arbitration experience, there should be additional training in the conduct of arbitration hearings, as well as a program of mentoring by established

¹⁸³ See Zack, *supra* note 1.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Zack, *supra* note 1.

¹⁸⁹ *Id.*

¹⁹⁰ American Nurses Association et al., *supra* note 160.

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arbitrators before such individuals are added to the rosters of the arbitration associations.¹⁹¹

It has also been asserted that if arbitrators are properly qualified and trained, many of the fears expressed about the arbitration of statutory claims will fall by the wayside. For example, one commentator suggests that the "splitting of awards"—giving each of the parties something in terms of remedy—could be reduced if the parties selected arbitrators who were specialists in employment discrimination issues.¹⁹² In addition, if the neutrals who are selected to resolve these claims have the necessary expertise, deference to their decisions will be warranted by the courts and the agencies responsible for the laws involved.¹⁹³

Finally, at least one commentator has stated that the arbitrators of statutory disputes should be limited to lawyers or former judges with experience in employment law.¹⁹⁴ This suggestion is the only one regarding training and qualification that I believe should be rejected. I disagree with this assertion because of the fact that many of the best arbitrators available have no legal training. If they are given the proper training as described above, there is no reason why they cannot arbitrate statutory claims. To turn away otherwise qualified men and women simply because they do not have a law degree is unnecessary.

3. *Maintaining Neutrality*

The same general goals that were raised in the previous sub-topic apply here as well: In order to assure the disputants that the new system is a credible one, the arbitrators who will be addressing statutory disputes must maintain neutrality. Again, all interested parties agree that this is a necessary and vital component to a successful arbitration system. The main fear that arises with reference to neutrality is that arbitrators may experience undue influence in deciding cases, particularly where their livelihood depends upon being rehired by the employer.¹⁹⁵ To protect against the inherent bias of the arbitrator stemming from the "repeat user" problem¹⁹⁶ in the non-union setting, many recommendations have been made.

¹⁹¹ Zack, *supra* note 1.

¹⁹² Vella, *supra* note 74.

¹⁹³ *Id.*

¹⁹⁴ Estreicher, *supra* note 170.

¹⁹⁵ American Nurses Association et al., *supra* note 160.

¹⁹⁶ The idea behind this being that arbitrators will be influenced by the fact that employers may rehire them in the future, and thus will be biased toward them knowing that their continued income flow is at least partially-based upon the employer's willingness to reemploy them. Such a possibility does not exist with regard to the employee as he or she

First, it is asserted that the employee should always have a role equal to that of the employer in choosing the arbitrator.¹⁹⁷ Second, if a roster system is used by an arbitration association, their self-interest can be counted on to keep active only those members found to be acceptable to both employers and employees.¹⁹⁸ Third, appropriate disclosure by potential arbitrators of prior dealings with the parties or their representatives is already a rule under the American Arbitration Association.¹⁹⁹ Therefore, further regulation regarding this is not necessary. Fourth, litigants and their representatives should be allowed to review the previous awards of the arbitrator in order to make an intelligent decision about the arbitrator's competence and neutrality. Finally, because the importance of neutrality cannot be overstated, judicial review of the outcome of an arbitration should be available to challenge a biased decision-maker or process.²⁰⁰ Specifics of when such review would be permitted will be discussed in detail in Section H.

4. Arbitrator Selection

Because there are no true opposing viewpoints on the subject of selecting arbitrators, as with the previous two subsections, some general conclusions and suggestions will be outlined. The selection of the arbitrator should be determined by the program established by the employer in accordance with the minimum regulations imposed by the governing agency. If the employer cannot devise selection procedures under the agreement that are satisfactory, then the selection procedures of a recognized neutral arbitration association should be utilized. For fairness purposes, one of the minimum requirements must be that employee claimants should be afforded the right to participate in the selection of the arbitrator. This is important as arbitration appears to hold the greatest promise of providing an acceptable alternative means of resolving employment law claims if both parties jointly select the arbitrator.²⁰¹ Such selection should be made from a panel developed by one or all of the arbitration associations,²⁰² and again, it should be required that the

will, in all likelihood, be in the arbitral forum as a one-time player. American Nurses Association et al., *supra* note 160.

¹⁹⁷ *Id.*

¹⁹⁸ Estreicher, *supra* note 170.

¹⁹⁹ *Id.*

²⁰⁰ American Nurses Association et al., *supra* note 160.

²⁰¹ Estreicher, *supra* note 170.

²⁰² See generally *supra* textual discussion at 178-79.

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employer's plan provide for utilizing such a pool.²⁰³ In addition, as mentioned with reference to neutrality, the parties and their representatives should be allowed to review the previous awards of the arbitrator in order to make an intelligent decision about the arbitrator's competence and neutrality. Finally, one advantage that is often not cited should be mentioned. The arbitration procedures suggested allow the individual to pick from a roster of arbitrators; by comparison, no party can select a judge, and jury panels are selected randomly.

5. Paying the Arbitrator

The issue of who pays the arbitrator was not addressed by the *Gilmer* Court. It is, however, a very important issue. Traditionally, to avoid the appearance of partiality, collective bargaining arbitration has required that the fee be divided equally between the employer and the union. Such an approach in individual contracts of employment may also make sense, but again a split in opinion exists regarding whether the cost should be borne by both parties or by the employer alone.

Advocates of the parties splitting the fee claim that because arbitration is much less expensive than litigation, many plaintiffs would have the resources to share the costs, at least on a mutually agreed-upon basis.²⁰⁴ The arbitration program or agreement could also provide that if the individual employee was the prevailing party, then the employer would pay for the costs of arbitration and other related expenses, such as transcripts.²⁰⁵ The claim here is that if employees were provided with a realistic comparison between the costs of litigation and arbitration, then many more employees would find arbitration to be the more appealing option.

The main gist of the other side of this argument is that the employer should be required to pay all of the costs of arbitration because if an employee is required to pay an equal share with the employer, then the cost may be prohibitive.²⁰⁶ Although this argument may have some validity, it is problematic in a couple of respects. First, if an employer is required to

²⁰³ Zack, *supra* note 1.

²⁰⁴ Vella, *supra* note 74.

²⁰⁵ *Id.* See also *Christianburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978). In that case, the employer, the prevailing party in a Title VII suit, sought attorney's fees against the plaintiff. The Court held that although a prevailing plaintiff in a Title VII suit is ordinarily to be awarded attorney's fees by the court in all but special circumstances, a prevailing defendant is to be awarded such fees only when the court in the exercise of its discretion has found that the plaintiff's action was frivolous, unreasonable, or without foundation.

²⁰⁶ *American Nurses Association et al.*, *supra* note 160.

pay the full share or even most of the cost, the arbitrator may be biased in favor of the deeper pockets of the employer. Second, although there are some arbitrators who would not have a problem with the employer paying all or most of the costs, many others decline work because they believe that even the perception of greater employer influence, through compensation and the potential for reemployment, reduces their effectiveness as neutrals.²⁰⁷ Because of the aforementioned deficiencies with the argument for employers paying all of the costs of arbitration, the first option of both parties splitting the costs appears to be the better choice.

C. Due Process

In terms of due process, there is little debate that at least some procedural safeguards are necessary. This is especially true when the concerns regarding the power imbalance between the employer and the employee are examined.²⁰⁸ Therefore, as with previous sections, some general suggestions will be given regarding the minimum protections that should be put in place.

First, a rule should exist stating that if a program or agreement does not meet the minimum due process requirements, which would be established by the agency or legislation under which the program would be monitored,²⁰⁹ then the decision rendered under the arbitration is unenforceable. If this were the policy, then unfair programs would not be used because of the risk of the arbitrator's award being set aside.²¹⁰ However, if all of the minimum requirements of due process are met, then a presumption that the result is enforceable should exist. This is important for two reasons: (1) it gives arbitration some credibility in terms of its inherent fairness and finality; and (2) it eliminates the procedural hurdle of appeals except in special circumstances.²¹¹

Second, in terms of protection solely for the benefit of employees, the following is suggested. It is a fact that employers are permitted to learn virtually everything about their employees, but that employees often cannot get even the most basic information about employment practices.²¹² Correcting this information imbalance would be a way to improve the level

²⁰⁷ Zack, *supra* note 1.

²⁰⁸ American Nurses Association et al., *supra* note 160.

²⁰⁹ See *supra* text at 173-77 for a related discussion in the context of the creation of arbitration programs.

²¹⁰ Vella, *supra* note 74.

²¹¹ See discussion *infra* part IV.G.

²¹² American Nurses Association et al., Testimony at the final public hearing before the Dunlop Commission (Sept. 29, 1994) (transcript available at the U.S. Department of Labor).

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of trust between the employer and the employee, and most importantly, make the arbitration process fairer.²¹³ In addition, employees should have the option to be represented by an attorney or any other representative in the arbitration proceeding if they so choose.²¹⁴ Furthermore, some basic due process notions such as notice, the right to discover information about the employer's case, and the right to have the outcome or arbitration reviewed by the court where appropriate should be afforded to the employee. Finally, it is important to keep in mind that while an arbitration may not provide either plaintiffs or defendants every legal protection, neither does a court of law.

D. Procedure

Many complaints exist regarding procedure. This section will therefore attempt to address these complaints and offer a possible solution. Before reaching such issues, it is important to keep in mind that just because certain procedures exist in courts,²¹⁵ it does not mean that they should automatically be imported into arbitration.²¹⁶

First, the main concern that exists revolves around the way that the rules of evidence are used in arbitration. In the union setting, arbitration is generally less formal and the rules of evidence are typically not applied. Instead, arbitrators will usually "receive into evidence almost anything for what its worth."²¹⁷ To minimize such concerns, arbitrators could be directed to keep a tighter rein on the conduct of the hearing and to exclude irrelevancies and privileged matter. However, it is also not necessary to apply the rules of evidence. If they are applied, arbitration could lose some of its appeal because its informal nature and expediency would be compromised. Ultimately, if employees are given both the right to present evidence freely, and the right to rebut the evidence and arguments offered by the other side, then the procedure is satisfactory. Second, in terms of the burden of proof, like in the union setting, the employer should bear the burden of proving "just cause" for any alleged improper actions that he has taken against his employee. If the employer meets this burden, then the

²¹³ American Nurses Association et al., *supra* note 160. See discussion *infra* part IV.E (discussing what the employee should be allowed to access).

²¹⁴ *Id.*

²¹⁵ For example, being allowed to bring class actions.

²¹⁶ Estreicher, *supra* note 170.

²¹⁷ Evan J. Spelfogel, *Legal and Practical Implications of ADR and Arbitration in Employment Disputes*, 11 HOFSTRA LAB. L.J. 247, 266 (1993) (footnote omitted) (quoting *Survey Shows Arbitrators Agree on Thought and Practice at Work*, Gov't Empl. Rel. Rep. (BNA) Dec. 10, 1984, at 744).

employee should have the opportunity to rebut the showing or prove that the reason given was a mere pretext. Finally, a neutral fact-finding process should be implemented into arbitration programs whereby the facts of the dispute could be established without making a judgment.²¹⁸ If such a method were used, it could be viewed as the first step in the arbitration process, and could result in many pending disputes being resolved.²¹⁹

E. *Discovery*

Generally, unless the parties provide otherwise in their collective bargaining agreement, prehearing discovery is not available in conventional labor arbitration. Although it is not clear how much discovery should be required when arbitrating in the non-union setting, it is clear that some discovery should be allowed in order to ensure the fairness of the process. At minimum, an arbitration program should allow the employee to access relevant information, documents, and his or her personnel file. Both parties should be given the opportunity to conduct depositions and to bring in witnesses at the arbitration. In addition, the arbitrator should have subpoena power. The ultimate goal with reference to discovery is to make sure that the plaintiff can fully develop his or her case.²²⁰ It is important to keep in mind, however, that arbitration's discovery process should not become as onerous as it is in the courts; if it does, one of the values of arbitration—its expediency—will be lost.²²¹

F. *Damages*

Unless the parties expressly provide otherwise in the collective bargaining agreement, arbitrators are generally empowered with the same remedial authority as judges. This would include, for example, the authority to award back pay, reinstatement, front pay and other "make whole" orders, and compensatory damages. It does appear, however, that courts are split as to whether arbitrators may award punitive damages.²²² For an arbitration program or agreement to be given deference by a court, the employee must be able to "vindicate [his or her] statutory cause of action in

²¹⁸ Lorber, *supra* note 150.

²¹⁹ *Id.*

²²⁰ Vella, *supra* note 74.

²²¹ *Id.*

²²² Compare *Fahnestock Co. v. Waltman*, 935 F.2d 512 (2d Cir. 1991) with *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1386-87 (11th Cir. 1988).

the arbitral forum."²²³ Therefore, arbitration agreements should specifically allow the arbitrator to award whatever relief is available under the terms of the relevant statute or common law, including punitive damages when appropriate.

Many commentators believe that even if arbitrators are permitted to give the same remedies as judges and juries, there is a strong possibility that they will not do so because of their inclination to satisfy both sides, and because of their knowledge that their income flow is dependent upon the parties—the employer in particular—rehiring them in the future.²²⁴ One way to deter this would be for the governing agency to monitor awards to ensure that non-union arbitration is producing satisfactory outcomes.²²⁵ A second deterrence would be that if the agreement fails to allow for all awards or the possibility of certain remedies, that should be grounds for overturning the decision or the agreement or both.²²⁶ Finally, as previously mentioned, parties should be permitted to review prior awards before selecting and retaining an arbitrator.

The final issue regarding remedies in arbitration is the allegation that the possibility of being given huge awards is lost. This assertion is problematic for a couple of reasons. First, the frequency of such awards being given is greatly overemphasized. The possibility of a plaintiff being able to afford a private lawyer is unlikely.²²⁷ In addition, with the agencies so overworked, a plaintiff may get only a very cursory investigation of his or her claim after much delay.²²⁸ A well-trained arbitrator will be able to avoid this problem by giving a plaintiff what he or she is truly entitled to, while deterring unlawful behavior on the part of the employer.

G. Finality of an Arbitrator's Decision

For the sake of credibility, it is crucial that an arbitrator's decision be final and binding and given the fullest weight permitted by law. In terms of what may be reviewed and when, the ultimate decision should be made by the monitoring agency. However, a good guide for deference to arbitral

²²³ *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985); see also *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 229 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483-86 (1989).

²²⁴ *Coalition of Labor Union Women*, *supra* note 159.

²²⁵ *Estreicher*, *supra* note 170.

²²⁶ *American Nurses Association et al.*, *supra* note 160.

²²⁷ *Estreicher*, *supra* note 170.

²²⁸ *Id.*

awards is the standard enunciated in *Spielberg Manufacturing Co.*²²⁹ In *Spielberg*, the Board stated that it would defer to the arbitrator's award where: (1) the proceedings have been fair and regular; (2) the parties have agreed to be bound; and (3) the decision is not clearly repugnant to the purposes and policies of the National Labor Relations Act. In the case of employment disputes, the arbitrator's decision would deserve deference in terms of the last factor, so long as it was not adverse to the purposes and policies of the statute or common law at hand. Some examples of when this might be appropriate follow. As previously stated, if there are cases in which significant mistakes of fact or law have been made, review should be allowed. In addition, it should also be permitted in cases where arbitrator bias or misconduct exists.²³⁰ Basically, if one of these examples exist, then review would be appropriate because the *Spielberg* test would not be met.

H. Publication of Opinions

Because the arbitration process in the union setting is almost always private, there is no requirement that a written decision be issued.²³¹ This, of course, is an advantage when the parties want to keep the matter confidential. A disadvantage, however, is that the lack of publication acts as a very weak influence on the behavior of employers because there is no public accountability.²³²

For the reasons that follow, such informal records are not appropriate in the non-union setting. First, if the arbitrator does not issue a written decision, then no precedent for future cases will exist.²³³ Such decisions must therefore be available for review if arbitration is truly going to become a credible and viable option to litigation. At minimum, arbitrators should be required to render written decisions that include findings of fact on each issue raised and a rationale given for why the decision was reached.²³⁴ A trade-off will be that the dispute between the parties will no longer be confidential. Second, by requiring arbitrators to publish written opinions, the public will receive notice of the employer's activities. This will be beneficial in serving the following functions: the employer will be deterred

²²⁹ *Spielberg Manufacturing Co. and Gruenberg*, 112 N.L.R.B. 1080 (1955). Such a suggestion was made by Arnold Zack, *supra* note 158.

²³⁰ Vella, *supra* note 74.

²³¹ See Hawkins *supra* note 132.

²³² Coalition of Women's Labor Unions, Testimony at the final public hearing before the Dunlop Commission (Sept. 29, 1994) (transcript available at the U.S. Department of Labor).

²³³ Vella, *supra* note 74.

²³⁴ Estreicher, *supra* note 170.

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from committing unlawful acts; the employees will feel that they are getting their proverbial "day in court;" and an explanation of exactly why the case has been won or lost will discourage retrying it or challenging the result.

V. CONCLUSION

There is no good reason to believe that the large scale experiment of employment arbitration in the non-union setting is complete. Measurable change is almost certain to occur in the upcoming years. The issues involved in this new playing field are complex and are therefore not easy ones to resolve. Despite this, arbitrators and the legal community must be prepared to confront these challenges and lead the process of change and adaptation.

If this new context demands an upgrading, refinement, or rebalancing of skills in the arbitration process itself, so be it. Such additional effort may be necessary in order to ensure the integrity and ability of arbitrators, the fairness of arbitration programs or agreements, the competent supervision of the discovery process, the fairness of hearings in accordance with judicial standards, and the ability to properly resolve and implement a broad range of remedies. Although it is extremely important that all of the individual issues and concerns be addressed and resolved, it may be just as important to offer employees an alternative short of full-blown litigation.

As has been true in the past, maintenance of the highest standards of professionalism, integrity, and competence must be the focus in the successful evolution of the institution of arbitration. The key to the continued vitality of arbitration will be its growth and its effective response to change. Willingness to meet the needs of the parties will surely ensure a promising result.

Shalu Tandon Buckley

